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December 4, 2013

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VIA ELECTRONIC FILING

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**Re: SCTC Petition to Modify Alternative Regulation Plans filed pursuant to S.C.
Code Ann. § 58-9-576(B) to take into Account Recent Action by the FCC
Docket No. 2013-55-C**

Ms. Boyd:

Enclosed for filing is the SC Cable Television Association's Motion for Review of Hearing Officer Directive. By copy of this letter we are serving the same on the parties of record. Should you have any questions, please contact me.

Yours truly,

ROBINSON, MCFADDEN & MOORE, P.C.

Frank R. Ellerbe, III

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Enclosure

cc/enc:

F. David Butler, Hearing Officer (via email)
M. John Bowen, Jr., Esquire (via email and US Mail)
Margaret M. Fox, Esquire (via email and US Mail)
Nanette S. Edwards, Esquire (via email and US Mail)
Scott Elliott, Esquire (via email and US Mail)
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John M. S. Hoefer, Esquire (via email and US Mail)

**BEFORE
THE PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA**

DOCKET NO. 2013-55-C

In Re:)	
)	
South Carolina Telephone Coalition Petition)	SC Cable Television Association's
to Modify Alternative Regulation Plans Filed)	Motion for Review
Pursuant to S.C. Code Ann. § 58-9-576(B) to)	of Hearing Officer Directive
Take Into Account Recent Action by the)	
Federal Communications Commission)	
)	
)	

Pursuant to R. 103-829, R. 103-804(G) and S.C. Code Section 58-3-40(C)(2) the South Carolina Cable Television Association (“SCCTA”) submits this motion requesting review by the Commission of a directive issued by the Hearing Officer dated November 25, 2013 (“Directive”).¹ The Directive denied a request by the SCCTA that the Commission take judicial notice of certain documents in the files of the Commission. The SCCTA hereby moves the Commission to overrule the Directive and to take judicial notice of the documents for the limited purposes outlined in the SCCTA proposed order submitted in this docket. In support of this motion the SCCTA would show the following.

Background.

In this docket the South Carolina Telephone Coalition (“SCTC”), on behalf of its members, sought and received approval from this Commission to increase the maximum rate charged for basic residential local exchange service. Six of the SCTC companies, all

¹ The Directive states that it is a “Standing Hearing Officer Directive” but since there was a specific order (Order No. 2013-110) appointing a Hearing Officer in this docket, this motion will treat the Directive as a Hearing Officer Directive.

of which are Carriers of Last Resort (“COLR”), then filed new tariff provisions raising their rates. Those rate increases were effective June 1, 2013. On June 14, 2013 the SCCTA filed a motion asking that USF withdrawals for those six companies be reduced by the amount of additional revenues that would be generated by the rate increases. On July 1, 2013 the SCTC filed a memorandum opposing the SCCTA motion and on July 10, 2013 the SCCTA filed a reply memorandum addressing the arguments advanced by the SCTC. Oral arguments were held on the motion before the Commission on September 11, 2013.

Following the oral argument, on October 28, 2013, the SCCTA filed a request that the Commission take judicial notice of certain documents. The SCTC filed a memorandum opposing the request on November 7, 2013. The Directive denying the request for judicial notice was issued on November 25. It stated three grounds for denying the request. This memorandum will address each of the three grounds.

The Request for Judicial Notice was not Untimely.

The first ground cited by the Directive for denying the request for judicial notice was that the request was untimely because it was made after the oral argument on the SCCTA motion. The timing of the judicial notice request is not an appropriate basis for denial and the ruling in the Directive is based on a misreading of R.103-846. The Commission’s rule on judicial notice is R.104-846(C). The Directive cited only part of the rule. In its entirety the rule reads as follows:

C. Notice of Cognizable Facts. Notice may be taken of judicially cognizable facts. In addition, notice may be taken of generally recognized technical or scientific facts within the agency's specialized knowledge. Parties of record shall be notified either before or during the hearing, or by

reference in preliminary reports or otherwise, of the material noticed. Parties shall be afforded an opportunity to contest the material proposed to be noticed.

This regulation does not have a hard and fast rule that would require notice prior to the oral argument on the SCCTA motion. What is required is that the parties “be afforded an opportunity to contest the material proposed to be noticed.” In this case the request for judicial notice was made almost a month prior to the deadline for submitting briefs and/or proposed orders – ample opportunity for parties to contest the material proposed to be noticed.

It is also significant, in assessing the timeliness of the request for judicial notice, to consider the context in which it was made. The relief sought by the SCCTA motion was a reduction of USF subsidies to prevent COLRs from over-recovering from the USF after increasing their rates for basic service. At the oral argument the SCTC argued, for the first time, that the annual filings by COLRs were “...the mechanism that the Commission set up to make sure that you had good oversight and to make sure that, as the fund moved along, the companies that were trying to draw money out of the USF were not drawing too much money.” Tr. p.47. The SCCTA requested that the Commission take judicial notice of the COLRs’ annual filings only after the SCTC made this argument relying on those filings. The reason that the SCCTA made the request for judicial notice is that a review of the actual annual filings shows that, contrary to the SCTC argument, they are not a mechanism for “good oversight” of the USF by the Commission.

The Request for Judicial Notice Was Not a Request to Broaden Discovery.

The second ground stated in the Directive for denying the request for judicial notice was that the request was a sort of backdoor way of getting around a previous ruling on discovery. In fact, the SCCTA has not requested any additional documents and is not seeking to obtain any documents beyond those previously produced. The request for judicial notice was a request that the Commission review the documents in its file as a way of assessing the SCTC argument regarding the utility of the annual reports as an oversight mechanism. Counsel for the SCCTA is confident, based on a review of the limited documents that were produced, that upon taking notice of these documents the Commission will conclude that the annual COLR filings are not a sufficient mechanism to prevent over-recovery from the USF. Accordingly, the “discovery abuse” ground cited by the Directive is not a basis for refusing the request for judicial notice.

The Documents Covered by the Judicial Notice Request are Relevant.

The third basis given by the Directive for refusing the request for judicial review is that the documents covered by the request are not relevant to the issues presented by the SCCTA motion. The relevance of the documents is best shown by the SCCTA proposed order submitted to the Commission on November 22. At pages 9-11 of its proposed order the SCCTA has asked the Commission to use a review of the documents for the limited purpose of responding to the SCTC argument that the annual filings are part of a mechanism that provides for oversight of the USF to prevent over-recovery. The SCCTA proposed order also asks the Commission to take notice of the fact that the cost studies submitted to the ORS by the COLRs have not been approved by the

Commission as required by S.C. Code Section 58-9-280(E) and previous orders of the Commission. The documents for which judicial notice was requested are highly relevant for these limited purposes.

Conclusion.

For the reasons stated above the Commission should overrule the Directive and take judicial notice of the requested documents for the limited purposes outlined in the SCCTA proposed order.

Dated this 4th day of December, 2013.

ROBINSON, MCFADDEN & MOORE, P.C.



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Cable Television Association

**BEFORE
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DOCKET NO. 2013-55-C

In Re:)
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South Carolina Telephone Coalition Petition)
to Modify Alternative Regulation Plans Filed)
Pursuant to S.C. Code Ann. § 58-9-576(B) to)
Take Into Account Recent Action by the)
Federal Communications Commission)
_____)

CERTIFICATE OF SERVICE

This is to certify that I, Toni C. Hawkins, a Paralegal with the law firm of Robinson, McFadden & Moore, P.C., have this day caused to be served upon the persons named below **SC Cable Television Association's Motion for Review of Hearing Office Directive** in the foregoing matter by placing a copy of same in the United States Mail, postage prepaid, in an envelope addressed as follows:

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Dated at Columbia, South Carolina this 4th day of December, 2013.



Toni C. Hawkins